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In The

Supreme Court of the United States

October Term, 1996

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, et al.,

Petitioners,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the State, exercising its police powers, has determined to regulate the solid waste industry as a utility, and has accordingly established waste flow directives for its governmental subdivisions and their contractors, are those directives subject to heightened scrutiny under the dormant Commerce Clause, *see C & A Carbone, Inc. v. Town of Clarkstown* ("*Carbone*"), 511 U.S. 383 (1994) (subjecting a municipal waste flow ordinance to heightened scrutiny), or to ordinary scrutiny, *see General Motors Corp. v. Tracy*, 519 U.S. ___, 117 S. Ct. 811, 136 L. Ed. 2d 761, 784 (1997) (applying balancing test in a utility context, and reaffirming the "continuing importance of the State's interest in protecting . . . captive market[s]")?

2. Should the Court exercise its supervisory powers to resolve the conflicts that exist among the Circuits regarding the scope and force of the holding in *Carbone*?

LIST OF PARTIES

In the proceedings below, Atlantic Coast Demolition & Recycling, Inc. was the plaintiff in the first-filed action (Civil Action No. 93-2669 (JEI)) and named as parties-defendants the Board of Chosen Freeholders of Atlantic County, the Atlantic County Utilities Authority, the Board of Chosen Freeholders of Camden County, the Pollution Control Financing Authority of Camden County and Scott A. Weiner, in his capacity as then Commissioner of the Department of Environmental Protection and Energy ("State" or "Department")[1]. All defendants except the Department agreed not to participate in the proceedings and agreed to be bound by the determination in consideration of which the plaintiff would not seek counsel fees against them pursuant to 42 U.S.C. § 1988. In the district court, the Mercer County Improvement Authority and the Gloucester County Improvement Authority were granted leave to appear as *amicus curiae*

On leave of the Court of Appeals for the Third Circuit, the following county authorities appeared as *amici curiae:* Hudson County Improvement Authority, Passaic County Utilities Authority, Essex County Utilities Authority, Mercer County Improvement Authority and Cape May County Municipal Utilities Authority. The Pennsylvania Department of Environmental Resources also was granted *amicus curiae* status.

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[1] During the course of these proceedings, the Department of Environmental Protection and Energy was reorganized and denominated the Department of Environmental Protection.

LIST OF PARTIES – Continued

Upon remand from the Court of Appeals, the *Atlantic Coast* proceeding was consolidated with Civil Action No. 94-3244 (JEI) filed by plaintiffs below C & A Carbone, Inc., Mayor Brett Schundler of the City of Jersey City, Mayor John Rooney of the Borough of Northvale, Mayor Dwight DeStefan of the Township of River Vale, the City of Passaic, the City of Paterson, the new Jersey Chapter of the National Solid Waste Management Association, and the Waste Management Association of New Jersey (hereinafter referred to as *Carbone II*). The named defendants in *Carbone II* were Robert C. Shinn, Jr., individually and in his capacity as Commissioner of the New Jersey Department of Environmental Protection and Energy, the New Jersey Department of Environmental Protection and Energy, Larry J. McClure, individually and in his capacity as Executive Director of the Bergen County Utilities Authority, the Bergen County Utilities Authority, Mark Guarino, individually and in his capacity as Director of the Bergen County Health Department, the Bergen County Health Department, Kenneth Blane, individually and in his capacity as Executive Director of the Hudson County Improvement Authority, the Hudson County Improvement Authority, Carol Ann Wilson, individually and in her capacity as Director of the Hudson County Health Department, William P. Schuber, individually and in his capacity as County Executive for Bergen County, Robert C. Janiszewski, individually and in his capacity as County Executive for Hudson County, Passaic County Utilities Authority, Anthony Ross, individually and in his

LIST OF PARTIES – Continued

capacity as Executive Director of the Passaic County Utilities Authority, and Nicola R. DiDonna, individually and in his capacity as County Executive of the County of Passaic.

On leave of the district court, the Hudson County Improvement Authority, the Passaic County Utilities Authority, the Essex County Utilities Authority, the Mercer County Improvement Authority, the Cape May County Municipal Utilities Authority, and the Camden County Energy Recovery Associates, L.P., were allowed to intervene as defendants in the consolidated cases. By order entered on June 9, 1995, the various municipal plaintiffs in *Carbone II* were dismissed from the case.

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CITATIONS OF OPINIONS BELOW

The Third Circuit's initial decision, reversing an unreported decision of the District Court, is reported at 48 F.3d 701. The District Court's decision on remand is reported at 931 F. Supp. 341. The Third Circuit's final decision is reported at 112 F.3d 652.

STATEMENT OF JURISDICTION

This matter arises from a final judgment of the United States Court of Appeals for the Third Circuit dated May 1, 1997. A petition for rehearing was denied on June 5, 1997. Jurisdiction exists under 28 U.S.C. §§ 1254, 2350.

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8, cl. 3, of the Constitution of the United States provides, "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian tribes."

STATEMENT OF THE CASE

I. Background

In New Jersey, throughout the 1950's and 60's, organized crime cartels dominated the market for solid waste disposal. *See Trade Waste Management Ass'n v. Hughey*, 780 F.2d 221, 223-24 (3d Cir. 1985); *State v. Trade Waste Ass'n*,

96 N.J. 8, 472 A.2d 1050 (1984). During this same time period, available landfill space dwindled to a vanishing point. Environmental awareness grew in inverse proportion.

With time, these forces gained strength, one from the other. The scarcity of landfill space made it easier for the cartels to control and exploit the disposal market. It also made illegal dumping more attractive, and, since the cartels lived outside the law, they succumbed to that temptation rather readily. Discovery of widespread illegal dumps, in turn, heightened environmental concerns among the public.

In 1970, the New Jersey Legislature responded by enacting two solid waste statutes, the Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.* ("the Management Act"), and the Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 *et seq.* ("the Utility Act"). The statutes, in combination, replaced the privately rigged disposal market with a publicly operated one, under which state and local authorities were empowered to exercise tight horizontal and vertical controls over all solid waste activities.

Horizontally, the Management Act divided the State into 22 "solid waste management districts," each to be supervised by a local authority with responsibility for developing a solid waste management plan for the district. Vertically, the Management Act charged the State Department of Environmental Protection with reviewing and approving the solid waste management plan for each district, N.J. Stat. Ann. 13:1E-20, and the Utility Act

charged the State Board of Public Utilities with regulating solid waste rates. N.J. Stat. Ann. 48:13A-2.

During the 1980's, the legality of New Jersey's state-controlled waste system was challenged on several separate grounds and occasions. *See A.A. Mastrangelo, Inc. v. Commissioner of Dep't of Envtl. Protection*, 90 N.J. 666, 449 A.2d 516 (1982) (raising state law challenges); *Trade Waste Management Ass'n, Inc. v. Hughey*, 780 F.2d 221 (3d Cir. 1985) (raising First Amendment challenges); *J. Filiberto Sanitation, Inc. v. Department of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988) (raising Commerce Clause challenges). Each challenge was rejected in turn, allowing the State to secure its hold on the solid waste market.

The cost of government supersedure has been high; public investment in solid waste infrastructure has exceeded $2 billion over the past two decades. The benefits, however, have been substantial. As found below by the District Court: "Over the last three decades, New Jersey has developed a system of waste management that brought the State from a crisis situation to one in which waste is disposed of efficiently and with a minimal negative impact on the environment." 931 F. Supp. at 346.

II. Proceedings Below

In June 1993, respondent Atlantic Coast Demolition & Recycling Inc., a Pennsylvania corporation that processes construction and demolition debris, filed suit in the District of New Jersey, challenging New Jersey's solid waste laws on Commerce Clause grounds. The District Court (Hon. Joseph E. Irenas, U.S.D.J.), by decision dated February 28, 1994, dismissed the suit, largely on the strength of

the Third Circuit's earlier decision in *Filiberto, supra*. Cognizant of the unique solid waste problems posed by New Jersey's population density, and recalling the State's troubled solid waste history, the District Court concluded that "legitimate local concerns far outweigh any negative impact on interstate commerce." (App. 85).

Atlantic Coast appealed. During the pendency of the appeal, this Court issued its decision in *Carbone*, striking down a municipal waste flow ordinance that the Court found to be "just one more instance of local processing requirements that we have long held invalid." 511 U.S. at 391. Based on *Carbone*, the Third Circuit reversed the District Court's dismissal of Atlantic Coast's complaint. 48 F.3d 701. The Court of Appeals concluded that "New Jersey's flow control regulations accomplish on a district level substantially what Clarktown's flow control ordinance accomplished on a local level," 48 F.3d 713, and ruled that their validity must therefore be assessed under strict scrutiny standards. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (describing the heightened scrutiny test under the Commerce Clause as a "virtually per se rule of invalidity"). The Third Circuit remanded the case to the District Court for findings on that score.

The District Court, on remand, held that, under a strict scrutiny analysis, "New Jersey's system of flow control of waste violates the Commerce Clause." 931 F. Supp. at 358. The District Court reaffirmed its previous finding that the State's regulations served a "valid local purpose," *id.* at 354, but determined that the State had "not met its burden of demonstrating an absence of feasible nondiscriminatory alternatives" to its system. *Id.* The

court further found that development of "the right combination of alternatives to develop a new system will require extensive planning," *id.* at 357, and for that reason stayed its decision "for two years following the date on which this case is no longer subject to the right to appeal." *Id.* at 358.

All parties appealed. On appeal, the Third Circuit affirmed the District Court's determination that the State's waste flow regulations were unconstitutional, but reversed the lower court's issuance of a post-appeal stay. 112 F.3d at 667-668. The Court of Appeals "sympathize[d] with the State defendants to the extent that local and state officials understandably presumed New Jersey's flow control laws to be constitutional when they issued bonds to build the local waste disposal facilities," *id.* at 666, but held that the prospect of financial hardship faced by the State and local authorities, "cannot justify discrimination against interstate commerce." *Id.*

The Third Circuit also reaffirmed its view that *Carbone* does not "establish a per se rule subjecting all flow control ordinances to strict scrutiny." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 800 (3d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1265, 134 L. Ed. 2d 213 (1996). In accordance with that interpretation of *Carbone*, the Court stated:

> Although the State of New Jersey may no longer preclude the designation of out-of-state waste disposal facilities [1], . . . the State and the

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[1] The court's statement that the State may "no longer preclude the designation of out-of-state waste disposal

> County Authorities remain free to regulate the flow of waste within New Jersey so long as the State's laws and regulations treat in-state and out-of-state facilities equally. [citation omitted]

112 F.3d at 669. In acknowledgment of the "weighty issues" raised by the case, the Court of Appeals stayed its decision pending further appeal. 112 F.3d at 673.

The court thereafter denied the State's petition for rehearing.

SUMMARY OF ARGUMENT

New Jersey's solid waste laws and regulations arose out of a pressing local need to replace a virulently dysfunctional market. The replacement system bears the usual hallmarks of state regulation – increased bureaucracy, compromised efficiency – but is by every measure superior to what preceded it. The dormant Commerce Clause does not prevent States from acting to protect the health, safety and welfare of their citizens when private markets fail to do so, and in particular does not prevent State takeover of a malfunctioning market by resort to utility regulation. Carbone does not speak to that situation, and in finding it to be controlling here, the Third Circuit erred. *See* Point I. In structure and effect, New Jersey's system of solid waste utility regulation much

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facilities" conflicts with its recognition elsewhere that the State's informal "self-sufficiency" policy did not preclude contracts with out-of-state facilities and operators. *See* 112 F.3d at 658 (noting the non-preclusive force of the State's informal "self-sufficiency" policy).

more closely resembles the state utility systems analyzed and vindicated in *Tracy, supra,* and in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U.S. 329 (1951).

With $1.75 billion in public bonds hanging in the balance, New Jersey must now, under the Third Circuit's decision, refashion its solid waste laws to conform to that court's interpretation of *Carbone*. Since, however, the Third Circuit's interpretation of *Carbone* is in conflict with other Circuits, New Jersey and its citizens will remain at substantial risk, no matter what policy choice the State makes in modifying its utility system. In view of the widespread disagreement over the meaning and scope of *Carbone*, and in view of the outsize fiscal – and public welfare – stakes, the Court should exercise its supervisory powers to clarify the boundaries of the limitations that the dormant Commerce Clause imposes on States in regulating utility systems and solid waste disposal. *See* Point II.

ARGUMENT

POINT I

THE COURT OF APPEALS MISCONSTRUED *CARBONE* IN HOLDING NEW JERSEY'S SOLID WASTE UTILITY REGULATIONS TO BE SUBJECT TO STRICT SCRUTINY UNDER THE DORMANT COMMERCE CLAUSE.

Born in crisis, New Jersey's solid waste laws represent a measured governmental response to real and persistent failures of the local waste disposal market. The

findings below amply demonstrate that, as the Third Circuit temperately phrased it, "New Jersey has one of the most serious and complex solid waste problems in the country." 48 F.3d at 718. New Jersey's solid waste laws follow a model used in many other States when faced with a need to secure the supply of services vital to the public interest in the face of a malfunctioning market: it declared all solid waste collection and disposal operators in the State, both public and private, to be public utilities, and regulated them as such. *See* N.J. Stat. Ann. 13:1E-2; N.J. Stat. Ann. 48:13A-2.

In 1988, called upon to review the validity of New Jersey's waste laws under the dormant Commerce Clause, the Third Circuit had little difficulty in upholding them. *Filiberto*, 857 F.2d at 913. Applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court found neither discriminatory purpose nor effect in New Jersey's solid waste utility system. 857 F.2d at 922. Seven years later, reviewing the same regulatory system, the Court reversed itself, finding that this Court's decision in *Carbone* required that the system be evaluated under "heightened scrutiny" standards. 48 F.3d at 717-718.

In so ruling, the Court found the public utility features of New Jersey's system to be of no import. The Court expressly rejected the State's reliance upon *Panhandle*, in which the Court upheld a state utility commission's efforts to protect a local gas company's franchise by prohibiting out-of-state companies from making direct sales to local industrial customers, and stated: "It is no discrimination against interstate commerce for Michigan to require appellant to route its sales of gas through the existing certificated utility. . . . [T]he statute . . . does not

distinguish between an interstate or intrastate agency desiring to operate in a locality already served by a utility." 341 U.S. at 336-337.

Before the Third Circuit, petitioners argued that the gas utility system upheld in *Panhandle* was, in its material respects, indistinguishable from New Jersey's solid waste utility system. As was true in *Panhandle* with respect to gas distribution, New Jersey issues certificates of public convenience and necessity to regulated solid waste utilities, which must serve all customers in the franchise area or district, and not just the profitable or "cream" accounts. *See Panhandle*, 341 U.S. at 334. Also, analogously to *Panhandle*, out-of-state vendors are not prevented from supplying waste processing services to the local market as long as they operate through the certificated franchisee. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117, 127-128 (1978) (rejecting the notion that the Commerce Clause protects any particular structure or method of operating in a retail market).

Despite these pronounced likenesses, the Court of Appeals found *Panhandle* to be "not helpful here- . . . because it was decided before *Arkansas Electric [Cooperative Corp. v. Arkansas Pub. Services Comm.*, 461 U.S 375 (1983)]." 48 F.3d at 714. The Court thus viewed *Panhandle* to have been effectively overruled by *Arkansas Electric*, and went so far as to state, "[I]t well may be that the heightened scrutiny test would [now] be applied to a situation like that presented in *Panhandle.*" *Id.*

In finding *Panhandle* to be a dead letter, the Court of Appeals plainly erred, as this Court's recent decision in *Tracy, supra*, makes clear. In *Tracy*, the Court upheld a

sales and use tax imposed by Ohio on natural gas suppliers. 117 S. Ct. at 830. The State Supreme Court had determined that local gas distribution companies ("LDC's"), which were regulated as utilities under state law and were thus required to serve high and low volume customers, were exempt from the tax. *See Chrysler Corp. v. Tracy*, 73 Ohio St.3d 26, 652 N.E.2d 185 (1995). General Motors, a high volume purchaser of natural gas from out-of-state suppliers, asserted on certiorari that the taxes were therefore discriminatory under the dormant Commerce Clause, because only LDC's received the exemption. 117 S. Ct. at 818.

Writing for the Court, Justice Souter rejected this argument. The Court extensively and repeatedly cited to *Panhandle*, thus signalling its vitality. *Id.* at 827. Recounting the market conditions that had given rise to the need for utility regulation of the gas industry – conditions that had led the judiciary consistently to uphold State regulations, despite their undeniable effect on interstate commerce – the Court stated that the cycle of "wasteful competition," price wars, company failures, massive consolidation and monopolistic pricing amply justified State preemption of the private market: "[C]ompetition would simply give over to monopoly. . . . It seemed virtually an economic necessity for States to provide a single, local franchise . . . free of competition from any source within or without the State . . . balanced by regulation and the imposition of obligations to the consuming public upon the franchised retailers." 117 S. Ct. at 820.

Most importantly here, the Court in *Tracy* reaffirmed that, under *Arkansas Electric*, the validity of state utility

regulations will usually be determined by a flexible balancing test that looks "to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in commerce' . . . 'to determine whether States have a sufficient interest in regulating . . . within their borders.' " 117 S. Ct. at 820 n.8 (quoting *Arkansas Electric).* Stating that *Arkansas Electric* simultaneously "expanded both the permissible scope of state utility regulation and judicial recognition of the important state interests in such regulation," *id.*, the Court stressed, "Nothing in *Arkansas Electric* undermines the earlier cases' recognition of the powerful state interest in regulating sales to domestic consumers." *Id.*

Dispelling doubts about the "continuing importance of the States' interest in protecting the captive market" for natural gas, the Court wrote that the importance of that interest

> is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. . . . We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was 'never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'

117 S. Ct. at 828 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960)).

The present case points out a latent, but nationally significant, conflict in the Court's recent dormant Commerce Clause decisions – specifically, a conflict between *Carbone* and *Tracy*, Where, as in New Jersey, a State has chosen to regulate the solid waste industry as a utility, no sound doctrinal reason exists to impose one level of scrutiny, strict scrutiny, on waste flow regulations, and another level of scrutiny, ordinary scrutiny, on gas flow regulations. Waste disposal and gas supply are equally articles of interstate commerce, and the public is an equally captive market for both types of services.

While *Tracy* makes clear that state utility regulations are not "immune from our ordinary Commerce Clause jurisprudence," 117 S. Ct. at 820 n.8, it also makes clear that granting of an exclusive franchise to a utility will not, in the usual case, draw heightened scrutiny. If that is so – and *Tracy* seems to leave no room for contrary argument – then the citizens of New Jersey have been dealt a judicial error of mammoth proportions by the Third Circuit. *Compare Filiberto, supra,* (upholding New Jersey's waste regulations using ordinary level of scrutiny) with *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, et al.*, 112 F.3d 652, 673 (3rd Cir. 1997) (striking them down using strict scrutiny).

Petitioners respectfully urge the Court to review and correct the Third Circuit's mis-application of *Carbone*, and to reconcile the present incompatible reasoning of *Carbone* and *Tracy*. Certiorari should be granted to resolve this important inconsistency, and to prevent future harm to state utility systems through over extension of *Carbone*.

POINT II

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE POST-*CARBONE* CASE LAW IS IN SUBSTANTIAL CONFLICT AND CALLS FOR EXERCISE OF THE COURT'S SUPERVISORY POWERS.

In the wake of *Carbone*, courts throughout the country have been confronted, if not inundated, with dormant Commerce Clause challenges to state and local solid waste programs. To date, nothing remotely approaching a consensus on *Carbone*'s meaning and effect has been reached. Rather, with almost coin-toss randomness, lower courts have reached inconsistent results on relatively interchangeable facts.

At the heart of the disagreement is the question of whether *Carbone* categorically prohibits waste flow regulations, *see, e.g., Condon v. Andino, Inc.*, 961 F. Supp. 323, 330 (D.Me. 1997) (opining that it was the "act of granting and enforcing an exclusive franchise to a local waste processor" that "primarily concerned" the Court in *Carbone*), or whether it merely prohibits some forms of waste flow regulations. *See, e.g., National Solid Waste Management Ass'n v. Williams*, 966 F. Supp. 844, 852 (D. Minn. 1997) (holding that *Carbone* does not prohibit waste flow directives where the "State, through its subdivisions, acts as a market participant in the collection management of waste").

New Jersey's present dilemma well illustrates the seriousness of the problem posed by the prevailing uncertainty over *Carbone*. The Third Circuit, while striking down New Jersey's established waste flow system, expressly noted that, under its reading of *Carbone*, the

State is free to revive the system as long as it adheres to non-discriminatory procurement procedures. *Atlantic Coast*, 112 F.3d at 670; *accord Harvey*, 68 F.3d at 802 (holding that *Carbone* does not prohibit waste flow control regulations that are implemented through a non-discriminatory procurement process; "We believe . . . that a local authority could choose a single provider – without impermissibly discriminating against interstate commerce – so long as the selection process was open and competitive and offered truly equal opportunities to in- and out-of-state businesses.")

Courts in other circuits, however, disagree with this reading of *Carbone*. In *Condon*, for instance, a District Court recently invalidated a municipal waste program that would likely have passed muster under the Third Circuit's standards, since the program was implemented through a non-discriminatory public bidding process. 961 F. Supp. at 330. The District Court in *Condon* found the neutral procurement process to be of little constitutional import. *Id.* (dismissing "the fact that there is a bidding process for all interested in obtaining the exclusive right to process waste generated within" the municipality). *Cf. Ben Ohrleins and Sons and Daughters, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) (taking note of the Third Circuit view, but declining to embrace or reject it).

Both readings of *Carbone* cannot be right. After all that has gone before, New Jersey should not be forced to see its $2 billion investment in waste disposal infrastructure used as a test case yet again. Nor should any other State or local body be put to such a risk.

The depth of the reigning confusion is perhaps best exemplified by the Second Circuit's decision in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 911, 133 L. Ed. 2d 842 (1996). In that case, the Second Circuit struck down an ordinance that required all municipal waste to be disposed of at a town-designated facility, but simultaneously upheld a series of municipal contracts that, in combination, required all residential waste in the municipality to be disposed of at a town-designated facility. As to the contracts, the court applied the "market participant" doctrine, *see Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and thereby finessed *Carbone. Smithtown*, 66 F.3d 515-16.

In *Smithtown*, the Second Circuit recognized that its decision created a split in the circuits, since the Eleventh Circuit had, in indistinguishable circumstances, declined to uphold a collection and disposal contract under the "market participant" doctrine. *See Waste Recycling v. South Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom. Waste Recycling v. SEAC Solid*, 29 F.3d 641 (11th Cir. 1994). The court also seemed well aware that the two municipal actions under review had little if any practical difference in their impact on interstate commerce, and that it was thus resting its decision on matters of form rather than substance. *Compare Pine Ridge Recycling, Inc. v. Butts County, Georgia*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (holding that public ownership of a designated facility does not deflect the

force of *Carbone*; "such a distinction would focus on form and ignore substance").[2]

In addition to the cloudy interface between the "market participant" doctrine and *Carbone*, another important point of uncertainty is whether "economic flow control," *i.e.*, the creation of economic incentives to encourage disposal of waste at a designated facility, presents a safe harbor from the strictures of *Carbone*. The Second Circuit so held in *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996) (upholding a municipal waste program under which the town offered free disposal at its designated incinerator to the contractor holding the exclusive town franchise for commercial waste disposal). However, such measures have been found in other cases to run afoul of the principles of *West Lynn Creamery v. Healy*, 512 U.S.186, 114 S. Ct. 2205 (1994), in which the Court struck down a facially neutral tax that operated, in combination with a separate subsidy program, to discriminate against out-of-state concerns. *See Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp.

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[2] Despite the general reluctance of courts to resolve issues of constitutional magnitude on mere formalities, *see, e.g., Pine Ridge, Smithtown* has engendered some support outside the Second Circuit. *See Barker Brothers Waste, Inc. v. Dyer County Legislative Body*, 923 F. Supp. 1042, 1055 (W.D. Tenn. 1996) (following *Smithtown*; upholding a regional authority's award of an exclusive waste disposal contract, despite authority's explicit consideration of contractor's commitment to use local landfill); *Williams*, 966 F. Supp. at 852 (upholding, on the basis of *Smithtown*, a statute requiring all contractors hired by public authorities to dispose of waste in conformance with county solid waste plans).

152, 156 (D. Conn. 1995) (striking down a town's fee that discouraged the use of other facilities).

At every point on the *Carbone* compass, opposing cases beckon the needle. State and local lawmakers stand pinned in the middle, committed to their historical duty to govern in this area, but unable to find true north. The prevailing uncertainty, while a boon for practitioners, imperils the resources of all other affected constituencies – taxpayers, ratepayers, bondholders, waste concerns, and (not least) courts alike. Without further guidance from the Court, the costly random walk will continue. As the dormant Commerce Clause's guardian, the Court has a special duty to monitor the impact of its decisions in this area. *See generally Camp Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. ___, 117 S. Ct. ___, 137 L. Ed. 2d 852, 877 (1997) (Scalia, J., dissenting). A survey of the post-*Carbone* landscape yields one, and only one, clear conclusion: in the area of state and local waste programs, the dormant Commerce Clause is rampaging, and is inflicting substantial harm on an innocent public.[3]

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[3] It is noteworthy, and somewhat troubling that, at the same time that the Court has found the "dormant" Commerce Clause to impose new limitations on the traditional police powers of state and local governments, *Carbone, supra; Camp Newfound, supra*, it has also found Congress' commerce powers to be less expansive than had previously been thought. *United States v. Lopez*, 514 U.S. 549 (1995). In combination, these two lines of cases appear to give the federal judiciary a *Lochner*-esque breadth of review over state and federal legislation. Cf. W. Eskridge, Jr., and P. Frickey, *Law as Equilibrium*, 108 Harv. L. Rev. 26, 51-52 (1994) (criticizing *Carbone*, in part because "the Court does not have a coherent theory of what is unacceptable" under the dormant Commerce Clause).

New Jersey, with good cause, has invested heavily in its solid waste utility system. If its outstanding $1.75 billion in bonded debt must be restructured – and the Third Circuit's decision leaves default or restructuring as the only options[4] – the cost of the restructuring should at least be a one-time expense. Review of the decision below will afford New Jersey, and its numerous similarly situated sister States, the guidance that is so conspicuously lacking in the current case law, and will cut short the burgeoning, and rudderless, spate of Commerce Clause challenges to state and local waste programs. A writ of certiorari should accordingly issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Because of the financial and regulatory disruptions posed by the Third Circuit's decision, the State also petitions for certiorari to review the question of whether the Court of Appeals erred in vacating the District Court's post-appeal stay. Petitioners fully support and join in the State's petition on that point.